No. 88-1155

FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CROWN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

GERALD GRIMES, Insurance Commissioner of the State of Oklahoma, Receiver for the United Equity Life Insurance Company; and OKLAHOMA LIFE AND HEALTH GUARANTY ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FREDERICK B. LACEY
Counsel of Record
JOHN S. KINZEY
CECELIA KEMPLER
ELIZABETH PAGE FOUCHER
LEBOEUF, LAMB, LEIBY & MACRAE
520 Madison Avenue
New York, New York 10022
(212) 715-8000

Of Counsel:

BURCK BAILEY
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS
2400 First National Center West
Oklahoma City, Oklahoma 73102
(405) 232-0621

—and—

C. WAYNE LITCHFIELD
LITCHFIELD & PATTERSON
Suite 106
5101 North Classen Boulevard
P. O. Box 18472
Oklahoma City, Oklahoma 73118-0472
(405) 843-4400

QUESTIONS PRESENTED

I. Should the Court grant this petition for a writ of certiorari to resolve the conflict between the decision of the United States Court of Appeals for the Tenth Circuit in this case, which allowed abstention to be raised for the first time on appeal after trial, and recent decisions of the Seventh Circuit, which hold that abstention is presumptively waived when a governmental party fails to raise the issue of abstention until after the case is tried before the district court?

II. Should a state governmental defendant, who did not request abstention throughout a trial on the merits and the entry of judgment in the federal district court, be allowed to raise the issue of abstention for the first time on appeal, and thereby obtain a trial *de novo* in state court that renders the first trial in the district court a waste of judicial time?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Reinsurance Association of America and the American Counsel of Life Insurance (ACLI) submitted briefs as amicus curiae in the Court of Appeals.

STATEMENT PURSUANT TO RULE 28.1

Petitioner Crown Life Insurance Company is a corporation organized under the laws of Canada. Its parent company is Crownx, Inc., also a Canadian corporation. Its subsidiaries, other than wholly owned subsidiaries, are Crown Financial Management Limited and U.S. Administrators, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
STATEMENT PURSUANT TO RULE 28.1	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Nature of the Case	2
B. Underlying Facts	2
C. Proceedings Below	3
REASONS FOR GRANTING THE PETITION	4
Point I. This Court Should Resolve the Conflict Between the Seventh Circuit and the Tenth Circuit Regarding Whether Abstention is Presumptively Inappropriate When a Governmental Party Fails to Raise the Issue of Abstention Until After the Case is Tried by a Federal Court	4
Point II. This Court Should Consider the Important Question of Whether Abstention is Presumptively Inappropriate When a Governmental Party Fails to Raise the Issue of Abstention Until After the Case is Tried by a Federal Court	9

	Page
CONCLUSION	12
APPENDIX A	1a
APPENDIX B	18a

TABLE OF AUTHORITIES

	Page
A. Cases	
AFA Distributing Co. v. Pearl Brewing Co., 420 F.2d 1210 (4th Cir. 1973)	8, 8n
Burford v. Sun Oil Co., 319 U.S. 315 (1943)	4, 5n
City of Houston, Texas v. Hill, ____U.S.____, 107 S. Ct. 2502 (1987)	6n
Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960)	5n
Colorado River Conservation District v. United States, 424 U.S. 800 (1976)	4, 9
England v. Board of Examiners, 375 U.S. 411 (1964)	5n
First Federal Savings and Loan Association of Boston v. Greenwald, 591 F.2d 417 (1st Cir. 1979)	9n
Fuller Company v. Ramon I. Gil, Inc., 782 F.2d 306 (1st Cir. 1986)	11n
Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975)	10
Hickey v. Duffy, 827 F.2d 234 (7th Cir. 1987)	7
Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964)	10
Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)	4
Mazanec v. North Judson-San Pierre School Corp., 763 F.2d 845 (7th Cir. 1985)	2, 7, 10, 11

Page

Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), *rev'd on other gr'ds*, 467 U.S. 229 (1984) 9n

Moore v. Sims, 442 U.S. 415 (1979) 5n

Moses v. County of Kenosha, 826 F.2d 708 (7th Cir. 1987). 7

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 10

Naylor v. Case & McGrath, Inc., 585 F.2d 557 (2d Cir. 1978) 8, 8n

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977) 6, 6n

Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) 4

Serpas v. Schmidt, 827 F.2d 23 (7th Cir. 1987) .. 7, 7n

Swisher v. Brady, 438 U.S. 204 (1978) 7n

Universal Amusement Co. v. Vance, 587 F.2d 159 (5th Cir. 1978), *aff'd*, 445 U.S. 308 (1980) 9n

Urbano v. Board of Managers, 415 F.2d 247 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970) .. 8, 8n

Waldron v. McAtee, 723 F.2d 1348 (7th Cir. 1983) 8, 8n

Wicker v. Board of Educ. of Knott County, Kentucky, 826 F.2d 442 (6th Cir. 1987) 11n

Younger v. Harris, 401 U.S. 37 (1971) 4, 5n, 10

Page

B. Miscellaneous

W.H. Rehnquist, 1987 Year-End Report on the Judiciary 10n

17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4242 (1978) 10

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CROWN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

GERALD GRIMES, Insurance Commissioner of the State of Oklahoma, Receiver for the United Equity Life Insurance Company; and OKLAHOMA LIFE AND HEALTH GUARANTY ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Crown Life Insurance Company ("Crown Life") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, 1a - 17a), which also constitutes its judgment, is reported at 857 F.2d 699.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1988. A timely petition for rehearing was denied on October 14, 1988 (Appendix B, *infra*, 18a - 19a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case does not involve the construction or application of any constitutional or statutory provisions.

STATEMENT OF THE CASE

A. The Nature of the Case

Because the evolving abstention doctrine necessarily raises difficult and important questions of federalism, this Court's recent decisions have sought to develop the rules governing the application of the doctrine on a cautious, case-by-case basis. This case presents the Court with an opportunity to address the important question of whether abstention is presumptively waived when a governmental party fails to seek abstention until after a case is tried by a federal court. The Tenth Circuit's decision below, which conflicts with the decision of the Seventh Circuit recognizing such a presumption in *Mazanec v. North Judson-San Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985) (per Posner, Circuit Judge), highlights the conflicting policy considerations that arise when a governmental party first requests abstention on appeal, following trial and judgment against it in the district court. The decision below is one of great significance that should be reviewed by this Court.

B. Underlying Facts

The underlying dispute arises out of efforts by Respondent Gerald Grimes ("Grimes"), who in his capacity as Insurance Commissioner of the State of Oklahoma is the receiver for the United Equity Life Insurance Company ("UELIC"), to realize on a "Coinsurance Indemnity Reinsurance Agreement" (the "Agreement") entered into between UELIC and Petitioner Crown Life.

On April 24, 1984, UELIC was placed in receivership pursuant to Oklahoma state law. Grimes was appointed receiver for UELIC and was charged with ascertaining UELIC's assets and liabilities. Thereafter, Crown Life advised Grimes that it was rescinding the Agreement and that it considered the Agreement void *ab initio* because UELIC had misrepresented its financial position. Grimes moved the state receivership court for permission to file a declaratory judgment action against Crown Life to determine the legal obligations of the parties under the Agreement.[1] The state receivership court, having found that the contractual obligations were disputed and that Crown Life's performance under the Agreement would materially affect Grimes' ability to pay the claims of UELIC's insureds, granted Grimes' motion for permission to bring a declaratory judgment action.

C. Proceedings Below

Grimes commenced a declaratory judgment action against Crown Life in state court. Crown Life removed the declaratory judgment action to federal court, basing removal on diversity jurisdiction. Although Grimes made an unsuccessful motion to remand the case to state court, he did not, after that motion was denied, request that the district court abstain from hearing the proceeding. The case was ultimately tried by the district court which entered judgment on the merits in favor of Crown Life with respect to the contractual obligations under the Agreement.

Grimes appealed the judgment of the district court to the United States Court of Appeals for the Tenth Circuit where for the first time in this case, he raised the issue of abstention. Grimes also argued on appeal that the district court did not have jurisdiction to hear the dispute.

The United States Court of Appeals for the Tenth Circuit, per Honorable Stephen Anderson, (1a-17a), determined that

---

[1] The Oklahoma Life and Health Guaranty Association joined Grimes in this motion and in the subsequent declaratory judgment action.

the federal court had jurisdiction of the case, but that, in accordance with *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the district court should have abstained from exercising its jurisdiction over the case. (15a). The Tenth Circuit accordingly reversed and remanded this case with directions to the district court to remand the case to the state court. (17a). Crown Life filed a timely petition for rehearing asserting that the Tenth Circuit's opinion failed to recognize that, as has been held in the Seventh Circuit, abstention is presumptively inappropriate in a case where the issue of abstention is not raised by the governmental party until after a trial on the merits in a federal court. The Tenth Circuit denied Crown Life's petition for rehearing, and Crown Life now petitions for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

POINT I

This Court Should Resolve the Conflict Between the Seventh Circuit and the Tenth Circuit Regarding Whether Abstention is Presumptively Inappropriate When a Governmental Party Fails to Raise the Issue of Abstention Until After the Case is Tried by a Federal Court.

As this Court recognized in *Colorado River Conservation District v. United States*, 424 U.S. 800, 813-17 (1976), there are three principal variants of the abstention doctrine. These are generally known as *Pullman*, *Burford*, and *Younger* abstention. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Younger v. Harris*, 401 U.S. 37 (1971). All three forms of the abstention doctrine are founded to varying degrees on considerations of federalism and comity. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 (1975).

The two types of abstention that are relevant to this case are the *Burford* doctrine, on which the lower court principally relied, and the more recently evolved *Younger* doctrine. In the context of civil litigation, *Burford* and *Younger* are very similar in their application. Both these forms of abstention are concerned with avoiding unnecessary federal interference in state proceedings in

which state officials or agencies are parties, and in which matters of significant and legitimate interest to the state are at issue.[2] When the requirements of *Burford* and *Younger* are satisfied, the plaintiff's federal litigation is dismissed even though the federal court has subject matter jurisdiction of the action, and the plaintiff is relegated to his remedies in the state system (with ultimate recourse to this Court through appeal or certiorari) in deference to the state's strong interest in the outcome of the controversy.[3]

---

[2] In *Burford* itself, the Court held that a challenge to state regulatory action should not be heard in the federal courts, but should be relegated to the state court with jurisdiction over agency appeals. *Burford v. Sun Oil Co.*, 319 U.S. at 332. In contrast to the *Burford* doctrine, which thus evolved in the context of civil litigation, the *Younger* doctrine originally was promulgated to discourage the federal courts from enjoining pending *criminal* prosecutions in the state courts. *Younger v. Harris*, 401 U.S. at 49. However, this Court has more recently held that the abstention principles of *Younger* are also applicable to pending civil proceedings in the state courts to which the state is a party, if the state has an important interest in the outcome of the case. *Moore v. Sims*, 442 U.S. 415, 423 (1979). As applied in the civil context, *Younger* is thus very similar to *Burford* abstention. The principal remaining difference between the two doctrines appears to be that for all of the elements of *Younger* to be met, a lawsuit or proceeding must actually be pending in a state court or agency at or around the time the federal litigation is commenced, while, under *Burford*, abstention is appropriate if an adequate remedy or hearing is available in the state system, even if the state proceeding that will provide that remedy has not yet been commenced. *Younger v. Harris*, 401 U.S. at 49; *Burford v. Sun Oil Co.*, 319 U.S. at 332.

[3] The third principal variant of the abstention doctrine, *Pullman* abstention, varies significantly from *Burford* and *Younger*. *Pullman* emphasizes the desirability of avoiding the adjudication of constitutional issues in the federal courts, rather than the importance of the state's stake in the litigation. *Pullman* applies when there is a *constitutional* challenge to an *ambiguous* state statute that has *not* been definitively construed by a state court, and when a narrow or limited construction of the statute by the state courts would obviate the need to adjudicate the federal constitutional challenge. When these conditions are satisfied, the *Pullman* doctrine may be invoked even though the state itself is not a party and has no interest in the outcome of the litigation. *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960). However, *Pullman* abstention has a less drastic effect on the federal plaintiff than do the other major forms of abstention. Unlike a plaintiff who is relegated to the state courts under *Burford* or *Younger*, a plaintiff whose case is sent to the state courts on *Pullman* grounds may elect to reserve his right to return to the federal district court for an adjudication of his federal constitutional claims after the state statute at issue has been construed by the state court. *England v. Board of Examiners*, 375 U.S. 411 (1964).

This Court has specifically held that a state may waive its right to seek abstention under the *Younger* doctrine:

> If the state voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the state's own system.

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 480 (1977). As the Court observed in that decision, the *Younger* line of cases "are designed to allow the State an opportunity to 'set its own house in order'. . . ." 431 U.S. at 479-80. If the State voluntarily chooses not to avail itself of this opportunity that the federal courts provide out of considerations of comity and federalism, there is no policy reason for the federal courts to refrain from exercising their jurisdiction, as the Court recognized in *Hodory*. Although the Court's opinion in *Hodory* did not expressly address the issue of whether the state can waive the benefits of *Burford* abstention as well as *Younger* abstention,[4] the application of the Court's analysis in *Hodory* must result in that conclusion because both *Burford* and *Younger* are based on policy considerations that are virtually, if not precisely, identical.[5]

Although the Court has clearly held that a state may waive the benefit of *Younger* and, by implication, *Burford* abstention, the Court has not yet addressed the issue of whether such a waiver can be inferred by the state's failure to seek abstention by the

---

[4] The Court's opinion in *Hodory* states that "there are, of course, two primary types of federal abstention", 431 U.S. at 477, which it identifies as *Younger* and *Pullman* abstention. This statement suggests that the Court may have been treating *Burford* as a variant of the similar *Younger* doctrine for purposes of its analysis.

[5] By contrast, the Court held in *Hodory* that the litigants cannot waive the application of the *Pullman* abstention doctrine, because it implicates the federal court's own interest in avoiding the unnecessary adjudication of constitutional questions, as well as concerns of comity and federalism. 431 U.S. at 480 n.11. *See also City of Houston, Texas v. Hill*, ____ U.S. ____, 107 S. Ct. 2502, 2512 n.16 (1987).

appropriate pretrial motion in the district court.[6] As the Seventh Circuit has recently observed, "the Supreme Court has not decided whether a state forfeits the protection of *Younger* [abstention] by silence." *Hickey v. Duffy*, 827 F.2d 234, 245 (7th Cir. 1987), *quoting Moses v. County of Kenosha*, 826 F.2d 708, 710 (7th Cir. 1987).

In the absence of definitive guidance from this Court, the Court of Appeals for the Seventh Circuit has adopted a rule that a state agency is presumed to have waived the opportunity to seek abstention if it fails to raise the issue before a case is tried in the district court:

> There is a presumption in this circuit against abstaining once a case has gone to trial; this presumption holds at least "where neither party requested abstention before trial."

Serpas v. Schmidt, 827 F.2d 23, 27 n.2 (7th Cir. 1987), *quoting Mazanec v. North Judson-San Pierre School Corporation*, 763 F.2d 845, 847 (7th Cir. 1985).[7] As will be more fully discussed in Point II below, the Seventh Circuit adopted this presumption to avoid the delay and the waste of federal judicial resources that would be inherent in returning a case that had once been tried in the federal courts for a new trial in the state courts.

---

[6] Although the Court has not considered whether a state forfeits the protection of *Younger* by failing to raise the issue in a timely fashion at the trial-court level, it has suggested that the state's failure to seek abstention at the *appellate* level may constitute a waiver. Thus, where "the state did not contend, either in the District Court or [before this Court], that appellee's suit . . . should be dismissed under the abstention doctrine of *Younger v. Harris*" the Court has stated that "in these circumstances, we are not inclined to examine the application of the doctrine *sua sponte*." *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978).

[7] Consistent with this Court's holdings that *Pullman* abstention may not be waived by the silence of the parties, the Seventh Circuit has recognized that its presumption is rebuttable by a showing that a constitutional adjudication could be avoided by a limiting construction in state court. *Serpas v. Schmidt*, *supra*, 827 F.2d at 27 n.2.

Because respondent Grimes neither raised the issue of abstention before trial in the district court nor offered the court of appeals an adequate explanation for his failure to do so, the application of the Seventh Circuit's rule of presumptive waiver in this case would have led to the summary rejection of his abstention arguments in the appellate court. The Tenth Circuit nonetheless allowed abstention to be raised for the first time on appeal, without penalizing Grimes in any way for failing to advance his abstention argument earlier in the litigation.

In ruling that this case should be remanded to be retried in the state courts, the Tenth Circuit relied on a line of cases that hold that, in appropriate circumstances, an appellate court may raise abstention *sua sponte* for the first time on appeal. *See Naylor v. Case & McGrath, Inc.*, 585 F.2d 557 (2d Cir. 1978); *AFA Distributing Co. v. Pearl Brewing Co.*, 420 F.2d 1210 (4th Cir. 1973); *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970); *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983). However, none of these cases on which the Tenth Circuit relied had been tried on the merits in the district court; all had been resolved early in the litigation on pretrial motions.[8] The Tenth Circuit failed to address in its opinion, or in its response to Crown Life's petition for rehearing, the policy considerations that apply after the federal court has invested the judicial resources necessary to try and adjudicate a controversy, and that led the Seventh Circuit to adopt its presumption against allowing abstention to be raised for the first time after a case has been tried. The decision below thus creates a direct conflict

[8] In three of the cases on which the Tenth Circuit relied, the trial court had dismissed the complaint for failure to state a claim, and the appellate court affirmed or remanded on the alternative ground of abstention. *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557 (2d Cir. 1978); *AFA Distributing Co. v. Pearl Brewing Co.*, 420 F.2d 1210 (4th Cir. 1973); *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970). The fourth case held that abstention was appropriate in a case that had been decided below on summary judgment without extensive pre-trial proceedings. *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983). Further, in both *Waldron* and *Naylor*, abstention had been sought by the parties in the lower court, and was therefore not raised for the first time on appeal.

with the Seventh Circuit's decision in *Mazanec* that should be resolved by this Court.[9]

POINT II

This Court Should Consider the Important Question of Whether Abstention is Presumptively Inappropriate When a Governmental Party Fails to Raise the Issue of Abstention Until After the Case is Tried by a Federal Court.

Even if this case did not present a conflict between the Seventh and Tenth Circuits, it would be appropriate for this Court to grant certiorari to address the important question of whether, and in what circumstances, a state agency may raise *Younger* and *Burford* abstention for the first time on appeal, after the state has lost on the merits at trial in the district court.

The abstention doctrine is, of course, a limited exception to the federal courts' "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Conservation District v. United States*, 424 U.S. at 817. When a case has been tried and decided on the merits in the district court, a number of important policy considerations make it at least presumptively inappropriate for a state agency to be allowed to raise abstention for the first time on appeal.

---

[9] Although other circuits have not definitively addressed the issue raised by this petition, decisions in the First, Fifth and Ninth Circuits suggest a tendency toward the position of the Seventh Circuit. *First Federal Savings and Loan Association of Boston v. Greenwald*, 591 F.2d 417, 425 (1st Cir. 1979) (governmental party's failure to raise issue of abstention below "came close to waiving, if [it] did not actually waive, any claim that the district court should abstain"); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 163 n.6 (5th Cir. 1978), *aff'd*, 445 U.S. 308 (1980) (appellant did not raise *Younger* abstention question, "and that issue being nonjurisdictional, is thus not before the court"); *Midkiff v. Tom*, 702 F.2d 788, 803 (9th Cir. 1983), *rev'd on other gr'ds*, 467 U.S. 229 (1984) (attorney general "effectively waived his claim for *Younger* abstention" by submitting the issue of a statute's constitutionality to the district court while failing to "raise the *Younger* issue at any time before the district court").

First, one of the purposes of the abstention doctrine is to "avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted." *Younger v. Harris*, 401 U.S. at 44. Where the state agency seeks abstention at the outset of litigation in the federal court, this purpose is served by directing the litigants to the state court before there has been any major expenditure of federal judicial resources. However, as this Court has recognized, abstention becomes less appropriate when there is "substantial progress" in the federal litigation. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983). When the federal litigation has progressed to the point of trial on the merits and judgment before abstention is sought, the consequence of abstaining is to delay the ultimate resolution of the controversy, and to waste the judicial resources that the federal court has invested in deciding the case. As Judge Posner observed for the Seventh Circuit in *Mazanec*:

> Abstention after trial condemns the parties to the delay and expense of a second trial, in state court, followed by an appeal in the state court system and after that, perhaps, a return to the federal court for more proceedings—which might include another trial; in any event, the first trial is made a complete waste of time.

763 F.2d at 846 (citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964); *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 84 (1975); 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4242, at p. 468 (1978)). Turning the original trial in the federal court into "a complete waste of time" is a particularly inappropriate burden to place on the federal judicial system when the average district judge is hard pressed to find enough days on the bench to try his civil case load.[10]

---

[10] In his 1987 Year-End Report on the Judiciary, the Chief Justice observed that the district courts annually disposed of 238,000 civil cases, and, that due to Congress' failure to create new judgeships, "only the steadfast efforts of our senior Judges has enabled us to manage our rising caseload to this point. . . ." W.H. Rehnquist, 1987 Year-End Report on the Judiciary at 7-8.

Second, the very fact that the state agency has failed to raise the issue of abstention prior to appeal strongly suggests that adjudication of a controversy in the federal court will *not* have any material adverse impact on important state interests or policy determinations. This point was also recognized in *Mazanec*:

> The state's delay in asking for abstention may reflect the fact that a federal ruling on the merits of the plaintiffs' complaint could have only a limited impact on important state interests.

763 F.2d at 849.

Finally, allowing a state agency to raise abstention as freely on appeal as in the district court would give the state's attorneys an undesirable incentive to hold their abstention arguments in reserve until they learn how they fare at the trial in the district court. Unless some higher standard is imposed on a state litigant who attempts to raise abstention for the first time on appeal, the efficient operation of the abstention doctrine will be frustrated, because the state will have no incentive to raise the abstention issue in a timely fashion in the district court.[11]

The question presented by this petition thus raises not only the very important issues of comity and federalism, but also serious issues concerning the waste of judicial resources, the imposition of burdensome delays, and the encouragement of forum shopping. These considerations would justify the Court in adopting a fixed

---

[11] Even when district courts abstain *prior* to a trial on the merits, there is a strong concern that, after a judgment by a state court, litigants might get a "second bite of the apple" by returning to federal court. *See, e.g., Wicker v. Board of Educ. of Knott County, Kentucky*, 826 F.2d 442, 446 (6th Cir. 1987); *Fuller Company v. Ramon I. Gil, Inc.*, 782 F.2d 306, 312 (1st Cir. 1986). The federal courts have made efforts to abate such relitigation by, for example, assuring that, where the state provides an adequate opportunity to litigate one's claims, the claims may be precluded from relitigation in a federal court. *Id.* Where a governmental party first requests abstention on appeal, it has already had one full opportunity to litigate, and is asking for a "second bite," as well as the possibility of a "third bite" if the case were to return to the federal courts.

and clear rule that the *Younger* and *Burford* abstention doctrines are waived if the state fails to seek abstention prior to trial and the entry of judgment in the district court. Alternatively, as the next step in the evolution of the abstention doctrine, the Court should adopt the Seventh Circuit's rule holding that a presumption of such a waiver exists when the issue of abstention is raised for the first time on appeal. Regardless of which rule it adopts, the Court should grant certiorari to give the lower courts guidance on the important issue of how they should treat requests for abstention that are made for the first time after trial and on appeal.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment of the court of appeals.

Respectfully submitted,

FREDERICK B. LACEY
Counsel of Record for Petitioner Crown Life Insurance Company
JOHN S. KINZEY
CECELIA KEMPLER
ELIZABETH PAGE FOUCHER
LEBOEUF, LAMB, LEIBY & MacRAE
520 Madison Avenue
New York, New York 10022
(212) 715-8000

Of Counsel:

BURCK BAILEY
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS
2400 First National Center West
Oklahoma City, Oklahoma 73102
(405) 232-0621

—and—

C. WAYNE LITCHFIELD
LITCHFIELD & PATTERSON
Suite 106
5101 North Classen Boulevard
P. O. Box 18472
Oklahoma City, Oklahoma 73118-0472
(405) 843-4400

January 10, 1989

APPENDIX

APPENDIX A
PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

GERALD GRIMES, Insurance Commissioner of the State of Oklahoma, Receiver for the United Equity Life Insurance Company; and OKLAHOMA LIFE AND HEALTH GUARANTY ASSOCIATION,	No. 86-1905
Plaintiffs-Appellants,	
v.	
CROWN LIFE INSURANCE COMPANY,	
Defendant-Appellee.	
REINSURANCE ASSOCIATION OF AMERICA and AMERICAN COUNSEL OF LIFE INSURANCE (ACLI),	
Amici Curiae.	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-84-1565A)

Bert E. Marshall, General Counsel, Oklahoma Insurance Department, Oklahoma City, Oklahoma, for Gerald Grimes, Plaintiff-Appellant.

Don J. Gutteridge, Jr. (Horace G. Rhodes and James W. Rhodes with him on the briefs), Kerr, Irvine & Rhodes, Oklahoma City,

Oklahoma, for Oklahoma Life and Health Guaranty Association, Plaintiff-Appellant.

Burck Bailey, Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City, Oklahoma (C. Wayne Litchfield, Litchfield & Wheeler, Oklahoma City, Oklahoma, with him on the brief), for Crown Life Insurance Company, Defendant-Appellee.

Daniel J. Conway, Counsel for Reinsurance Association of America, Washington, D.C., Jack H. Blaine and Phillip E. Stano, Counsel for American Council of Life Insurance, on the brief for Amici Curiae.

Before ANDERSON, BALDOCK and BRORBY, Circuit Judges.

ANDERSON, Circuit Judge.

This dispute arises out of efforts by the Oklahoma Insurance Commissioner as liquidator of the United Equity Life Insurance Company ("UELIC") to realize on a "Coinsurance Indemnity Reinsurance Agreement" (the "Agreement") entered into between UELIC and Crown Life Insurance Company ("Crown"). Gerald Grimes, the Oklahoma Insurance Commissioner, determined before UELIC was placed in liquidation that the Agreement between UELIC and Crown was sufficient under state law to allow UELIC to transfer some of its insurance liability to Crown and thus continue to write insurance for policyholders. After UELIC was put into liquidation, however, a dispute about the validity and extent of the coverage of the policy arose. This appeal centers on the interpretation of certain provisions contained in the Agreement; the effect of the interpretation of the Agreement by the Oklahoma Commissioner of Insurance; and, finally, a determination as to the proper forum in which to decide these questions.

I.

The resolution of these issues depends on the following facts. On April 24, 1984, UELIC was placed in receivership pursuant to Oklahoma state law by the District Court of Oklahoma County. Grimes was appointed as UELIC's receiver. He was charged by the court with ascertaining "UELIC's assets and liabilities." R. Vol. I Tab 13 Exh. A at 2. Two days thereafter, the state district court entered an order staying "the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments, or other liens, or the making of any levy against the receivership estate or against the assets or any part thereof." *Id.* at Exh. B.

Thereafter, Crown informed Grimes that it was rescinding the reinsurance Agreement it had entered with UELIC and that Crown considered the Agreement void from the beginning because of UELIC's misrepresentation of its financial position. Grimes, who had previously decided that this Agreement was sufficient under state law to protect UELIC's policyholders and thus allowed UELIC to transfer some of its liabilities to Crown, subsequently applied to the receivership court for permission to file a declaratory judgment action against Crown to determine the legal obligations of the parties under their Agreement.[1] The Oklahoma court found that the interpretation of the contract was disputed and that "the performance by Crown under said Agreement will materially effect (sic) the ability of the Receiver to pay claims to insureds of United Equity," *id.* at Exh. C, and granted permission for Grimes to bring this action which he brought in the same state court in which the receivership was pending. However, Crown successfully petitioned for removal of the declaratory judgment action from state to federal court. The federal district court declined to remand on Grimes' assertion that it was without jurisdiction to hear this case.

---

[1] Grimes was joined in this motion, the subsequent declaratory judgment action, and this appeal by the Oklahoma Life and Health Guaranty Association.

The issues which were before the federal court prior to trial were, (1) whether the contract was void because it was induced by fraud; (2) whether the contract was ambiguous; (3) whether the Agreement called for Crown to bear the risk of UELIC's insolvency; (4) whether the Agreement required Crown to reimburse UELIC based on claims which it had incurred or only on claims which UELIC had paid; and, (5) whether Crown was entitled to offset premiums owed it by UELIC against any amount which it was required under the Agreement to pay. The district court, without addressing the issue of revocation or misrepresentation decided all other issues in favor of Crown. R. Vol. I Tab 86.

Grimes appeals this decision arguing that the federal district court did not have jurisdiction to hear this dispute, or, alternatively, that if the court did have jurisdiction, it should have abstained from its exercise. Grimes raises other challenges to the district court's decision, but because we determine that in this case the federal district court should have abstained, we do not address the merits of these claims.

II.

Grimes first asserts, based primarily on a theory of *in rem* jurisdiction, that the federal district court did not have jurisdiction to hear this suit. He argues that the state district court has already taken jurisdiction over the assets of UELIC, and that one of these assets is the reinsurance contract with Crown. Accordingly, since the state court had jurisdiction over all of the assets first, Grimes argues that the federal court had no jurisdiction to determine UELIC's rights in the insurance contract. *See Blackhawk Heating & Plumbing Co., Inc. v. Geeslin*, 530 F.2d 154 (7th Cir. 1976); *Professional Const. Consultants, Inc. v. Grimes*, 552 F. Supp. 539 (W.D. Okla. 1982). On the other hand, Crown argues that this suit is one in which Grimes as receiver for UELIC, brings a plenary *in personam* action against Crown to obtain a judicial determination of Crown's obligations under the contract. *Central States S.E. And S.W. Areas Health and*

Welfare Fund v. Old Sec. Life Ins. Co., 600 F.2d 671 (7th Cir. 1979); *Barrett v. International Underwriters Inc.*, 346 F.2d 345, 348-49 (7th Cir. 1965). As such, Crown argues, it is well within the jurisdictional prerogatives of the federal court.

We are persuaded by Crown's argument because the Oklahoma County District Court specifically authorized a separate judicial action to determine the different parties' rights under the reinsurance agreement. Once the state court has authorized such an independent proceeding, the larger context in which it occurs does not present a bar to federal jurisdiction where the case is properly removed to a federal court. *See Levy v. Lewis*, 635 F.2d 960, 964-66 (2d Cir. 1980) ("'Hence other courts, *except when called upon by the court of primary jurisdiction for assistance*, are excluded from participation. This should be particularly true as to proceedings for the liquidation of insolvent insurance companies. . . .'") (quoting *Motlow v. Southern Holding & Sec. Corp.*, 95 F.2d 721, 725-26 (8th Cir.), *cert. denied*, 305 U.S. 609 (1938) (emphasis added). In such a context the ruling by the federal courts as to the rights of the parties in the contract will not "interfere with the constructive possession" of that asset by the Oklahoma County District Court, nor does it create any danger of inconsistent adjudications because the action is only before the federal court. Accordingly, we find that the Oklahoma County District Court's jurisdiction over all the assets in UELIC's estate, does not jurisdictionally bar the federal court from determining the value of one of those assets in this context.[2] *See Law Enforcement Ins. Co., Ltd. v. Corcoran*, 807 F.2d 38, 41-42 (2d Cir. 1986), *cert. denied*, 107

---

[2] As *Levy* also indicates, federal courts are beginning to view the *in rem* -- *in personam* distinction as one which does not prevent jurisdiction but invites abstention.

> The Court was referring to the accepted principle that once a court has jurisdiction over a particular *res*, no other court can proceed *in rem* with respect to the same *res*. The principle is often stated as a matter of jurisdiction: that a second court cannot have

(*Footnote continued*)

S. Ct. 1896 (1987); *Levy*, 635 F.2d at 964-66; *Metropolitan Life Ins. Co. v. Board of Directors of Wis. Ins. Sec. Fund*, 572 F. Supp. 460, 470 (W.D. Wis. 1983); *In Re All-Star Ins. Corp.*, 484 F. Supp. 623, 624-25 (E.D. Wis. 1980).

Grimes' second jurisdictional argument also fails on the same ground. Grimes argues that the Oklahoma statutory scheme for conducting insurance liquidation gives the Oklahoma County District Court jurisdiction over all claims "both *for* and *against* an insurance company in liquidation." *Professional Const. Consultants*, 552 F. Supp. at 541 (quoting *Knickerbocker Agency v. Holz*, 4 N.Y.2d 245, 250, 149 N.E.2d 885, 889, 173 N.Y.S.2d 602, 607 (1958)). According to Grimes, such a state scheme in conjunction with the McCarran-Ferguson Act[3] which expresses

---

> jurisdiction to proceed *in rem* if jurisdiction over the *res* is maintained by another court. Nevertheless, as the Court appeared to recognize, the principle involved is more accurately described as a prudential doctrine in which a second court with concurrent jurisdiction will exercise its discretion to defer to another court for the sake of comprehensive disposition of rights in a particular piece of property or in a fund.

Levy, 635 F.2d at 965-66. Although this suit is technically separate from the liquidation proceeding, and thus the pendency of the liquidation proceeding poses no jurisdictional bar, the unique issue in this declaratory judgment action is the calculation of the value of an asset of an insurance company in liquidation, and the action itself was authorized by the liquidation court. Thus, although we have determined that for jurisdictional purposes this suit is *in personam*, it does have substantial *in rem* characteristics. Because in contexts such as this there is no practical difference between *in personam* and *in rem* jurisdiction, *see, e.g.*, *Metropolitan Life Ins. Co. v. Board of Directors of Wis. Ins. Sec. Fund*, 572 F. Supp. 460, 471 (W.D. Wis. 1983) ("Although plaintiffs' complaint is brought *in personam*, rather than *in rem*, . . . the consequences of the filing are no different."), we consider the nature and origin of the proceeding in our abstention analysis. *See infra* section III.

[3] The McCarran-Ferguson Act provides that:

> [T]he continued regulation and taxation by the several States of the business of insurance is in the public interest . . . .

(*Footnote continued*)

the congressional policy of leaving insurance regulation to the states, gives Oklahoma courts exclusive original jurisdiction over this declaratory judgment action against Crown.

Nonetheless, even if Grimes' argument is correct, he did not seek to obtain a determination of Crown's liability as a part of the liquidation action. He instead obtained permission to file a separate declaratory judgment action which he brought before a different judge in the same court. Once the liquidation court approved the separate pursuit of a declaratory judgment action, it had, in effect, called upon another court for assistance. Thus, when this action was properly removed, it was within the jurisdiction of the federal court.

As a further matter, we are hesitant to accept the proposition that a state statute, even when buttressed by the federal policy expressed in the McCarran-Ferguson Act, can affect the invocation of federal diversity jurisdiction. *See Atlantic & Pac. Ins. Co. v. Combined Ins. Co. of Am.*, 312 F.2d 513, 515 (10th Cir. 1962) ("The McCarran Act serves to limit the authority of federal regulatory agencies as to practices in the insurance business in the face of state acts and in the absence of specific federal law . . . but it does not follow that there is thereby a modification of diversity jurisdiction of the federal courts."); *cf. Colorado River Water Conservation Dist. v. United States*, 424

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

15 U.S.C. §§ 1011-12.

U.S. 800, 807-09 (1976) (act does not modify diversity jurisdiction in the absence of an affirmative showing of an intent to repeal). Thus, the policy of the McCarran-Ferguson Act was to leave the regulation of insurers to the states, it did not intend to divest federal courts of the right to apply state law regarding the regulation of insurers in appropriate diversity proceedings. We accordingly reject Grimes' argument that the federal district court had no jurisdiction to hear this case.

III.

On appeal, however, Grimes raises the argument that even if it had jurisdiction, the federal court should have abstained from exercising it. Crown, on the other hand, asserts that to abstain in this instance would constitute an abdication of federal judicial responsibility, and that because Grimes failed to raise this issue at the trial below, the argument has been waived.

It is recognized by all courts that:

> "Abstention from the exercise of federal jurisdiction is the exception, not the rule. 'The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'"

Moses H. Cone Hosp. v. Mercury Const. Corp., 460 U.S. 1, 14 (1983) (quoting *Colorado River*, 424 U.S. at 813).

Although there are several situations in which this narrow exception to the exercise of jurisdiction is recognized as appropriate by the Supreme Court, the type most applicable in this situation is the abstention recognized in *Burford v. Sun Oil Co.*, 319

U.S. 315 (1943) (Supreme Court held the exercise of federal jurisdiction improper to review decisions made by a Texas commission to regulate and conserve the pumping of oil and gas in Texas). In *Burford*, the Supreme Court held that federal courts should exercise their discretionary power to refuse to hear cases within their jurisdiction when to do so would impair the "independence of state governments in carrying out their domestic policy." *Id.* at 318 (quoting *Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935). In a later abstention case involving a different kind of abstention, the Supreme Court characterized *Burford* abstention as appropriate where:

> "there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar. . . . In some cases, however, the state question itself need not be determinative of state policy. *It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.*"

Colorado River, 424 U.S. at 814 (emphasis added).

The McCarran-Ferguson Act thus becomes relevant to this case, not because it removes diversity jurisdiction from the federal courts in insurance matters, but because it encourages the states to formulate their own systems to regulate insurers doing business in their states. Therefore, in instances where states have responded to this congressional policy by formulating complex and specialized administrative and judicial schemes to regulate insurers, especially the liquidation of insolvent insurers, it becomes increasingly possible that the exercise by a federal court of its jurisdiction will prove to be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Id.*

Thus, given the traditional federal deference provided to state receivership proceedings, *see Penn Gen. Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935); *Pennsylvania v. Williams*, 294 U.S. 176 (1935); *Duggins v. Hunt*, 323 F.2d 746 (10th Cir. 1963); *Inland Empire Ins. Co. v. Freed*, 239 F.2d 289, 293 (10th Cir. 1956),[4] coupled with complex and comprehensive procedures adopted for the liquidation of insolvent insurers pursuant to the provisions of the McCarran-Ferguson Act, most federal courts have declined to exercise jurisdiction in disputes like this one which present themselves in the larger context of state liquidation proceedings. *See Corcoran v. Ardra Ins. Co., Ltd.*, 842 F.2d 31 (2d Cir. 1988) (upheld remand of action brought by New York Superintendent of Insurance against reinsurers to state court); *Law Enforcement Insurance Co., Ltd. v. Corcoran*, 807 F.2d 38, 42-44 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1896 (1987) (Even though federal court could made "a declaration of rights to property being administered by another [court]" without "any unseemly interference on the part of the federal courts in state court proceedings," such a determination should not be "wrenched from the context in which the state court acted, the context of a unified administrative/judicial proceeding.");

---

[4] Federal courts also hesitate to issue declaratory judgments when an existing state proceeding raises the same issues between the same parties and requires only the application of state law.

> " 'Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.' "

Will v. Calvert Fire Ins. Co., 437 U.S. 655, 663-64 (1978) (plurality opinion) (quoting *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942); *see also Duggins v. Hunt*, 323 F.2d 746, 748 (10th Cir. 1963) ("The Declaratory Judgment Act is not intended to give alternative forums so as to draw federal and state courts into potential conflict."). Although in this case the declaratory judgment action was removed, the same policies merit consideration.

Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980) (dismissal of federal court suit appropriate in context of state insurance liquidation proceedings); *Cummings Wholesale Elec. Co., Inc. v. Home Owners Ins. Co.*, 492 F.2d 268 (7th Cir.), *cert. denied*, 419 U.S. 833 (1974) (same); *Aims Enterprises, Inc. v. Muir*, 609 F. Supp. 257, 260-63 (M.D. Pa. 1985) (same); *Metropolitan Life v. Board of Directors of Wis. Ins. Sec. Fund*, 572 F. Supp. 460, 472-73 (W.D. Wis. 1983) (same); *In Re Matter Of All-Star Ins. Corp.*, 484 F. Supp. 623, 624-26 (E.D. Wis. 1980) (Despite the existence of jurisdiction, district court remanded suit seeking a declaration of rights in asset of insurance company in liquidation.); *Mathias v. Lennon*, 474 F.Supp. 949 (S.D.N.Y. 1979) (dismissal of federal action in deference to a state liquidation proceeding); *Meicler v. Aetna Casualty & Sur. Co.*, 372 F. Supp. 509 (S.D. Tex. 1974), *aff'd*, 506 F.2d 732 (5th Cir. 1975) (same).

Of course, even when states formulate comprehensive schemes for insurance regulation and liquidation, federal courts may properly exercise their jurisdiction in some cases. A number of factors are relevant to a determination of whether the exercise of jurisdiction is proper. These factors include: (1) whether the suit is based on a cause of action which is exclusively federal, *see Central States S.E. And S.W. Areas Health and Welfare Fund v. Old Sec. Life Ins. Co.*, 600 F.2d 671, 677 (7th Cir. 1979) (State act granting exclusive original jurisdiction over insurance liquidation to state courts "cannot be interpreted as precluding a party from pursuing a congressionally created federal claim in the only courts able to provide affirmative relief on that claim."); (2) whether the suit requires the court to determine issues which are directly relevant to the liquidation proceeding or state policy in the regulation of the insurance industry, *see Colorado River*, 424 U.S. at 815 ("While state claims are involved in the case, the state law to be applied appears to be settled."); *United Services Auto. Ass'n v. Muir*, 792 F.2d 356, 364-65 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 875 (1987) (state law at issue did not relate to insurance regulation, nor the transferring or spreading of the policyholder's risk, and it required neither a

consideration of any other Pennsylvania statute nor a complicated regulatory scheme); (3) whether state procedures indicate a desire to create special state forums to regulate and adjudicate these issues, *see Burford*, 319 U.S. at 325-37; *Brandenburg v. First Maryland Sav. and Loan Inc.*, 660 F. Supp. 717, 728-29 (D. Md. 1987); *Riley v. Heil Co.*, 624 F. Supp. 695, 698 (S.D. Ohio 1985); and, (4) whether difficult or unusual state laws are at issue, *see Colorado River*, 424 U.S. at 815; *Board of Educ. of Valley View v. Bosworth*, 713 F.2d 1316, 1320 (7th Cir. 1983); *Naylor v. Case and McGrath, Inc.*, 585 F.2d 557, 565 (2d Cir. 1978).

In the instant case the state of Oklahoma has formulated a complex and comprehensive scheme of insurance regulation which contains the Uniform Insurers Liquidation Act for the liquidation of an insolvent insurer. The provisions of the Act specify not only that the venue of any delinquency proceedings shall be in Oklahoma County District Court, but they grant to that court "exclusive original jurisdiction of delinquency proceedings pursuant to the provisions of this article." Okla. Stat. tit. 36 § 1902(A). Thus, Oklahoma has not only adopted a comprehensive scheme to oversee the liquidation of insolvent insurers, it has provided a particular court — the Oklahoma County District Court — to oversee liquidation proceedings. The effect of this provision grants the Oklahoma County District Court a special relationship of cooperation, technical oversight and concentrated review with the Oklahoma Commissioner of Insurance in the process of liquidating insurers. *See Burford*, 319 U.S. at 326-27. The statutory scheme also provides for review of that court's decisions by the Oklahoma Supreme Court. Okla. Stat. tit. 36 § 1902(D).

Neither party raises any question of uniquely federal jurisdiction here. The questions at issue in this case are questions of state law which affect the fundamental purposes of a state liquidation proceeding. The fundamental dispute in this case is whether the reinsurance contract complies with the requirements of Okla.

Stat. tit. 36 § 711(c) which would require Crown to bear the risk of UELIC's insolvency.[5] Oklahoma allows insurers to transfer their liabilities to other insurers through reinsurance contracts if they comply with this section; this allows the transferring or ceding insurer to increase the amount of insurance policies which it can write. Section 711(c) states that:

> In addition to other restrictions provided for in this subsection, no credit shall be allowed, as an asset or as a deduction from liability, to any ceding insurer for reinsurance nor increase the amount it is authorized to have at risk unless the reinsurance is payable by the assuming insurer on the basis of the liability of the ceding insurer under the contracts reinsured without dimunition because of the insolvency of the ceding insurer.

This statutory plan, as we read it, and as it was read by the district court, requires the Commissioner of Insurance to determine in any particular instance, whether a reinsurance agreement qualifies to permit an insurer to transfer its liabilities to a reinsurer and thus continue to write insurance.

In this case, Grimes asserts that he determined that the contract between UELIC and Crown qualified and he thus allowed UELIC to take the credit, remain in business, and write more insurance contracts. Such a determination by the Commissioner's office has major ramifications for the policyholders of insurers which eventually end up in insolvency proceedings. What effect the Commissioner's previous determination has on his ability to collect from Crown, or on a subsequent judicial construction of the contract is unclear, but it is a fundamental and

---

[5] A determination that the contract complies with § 711(c) would also apparently determine that Crown is obligated to reimburse Grimes not just for claims paid by UELIC but for claims on which it is liable.

important question of state law and policy[6] which the Oklahoma County District Court should be allowed to answer in the first instance. In a similar case the Second Circuit held that:

> the Superintendent's power to collect on reinsurance agreements entered into by a liquidated company is a matter of no little concern, for policy holders have no direct right of action against reinsurers; only the Superintendent, as liquidator, can recover from the reinsurer. . . . *The extent to which the Superintendent is able to collect thus affects the degree to which the insolvent insurer's estate will have assets sufficient to satisfy the claims of its creditors. It is clear that these questions are important to the state regulatory scheme and that the scope of the Superintendent's power, insofar as it is pertinent to this case, has not yet been resolved by the state's courts.* Accordingly, the district court's decision to abstain appears to fit particularly well within the *Burford* goal of avoiding interference with specialized state regulatory schemes.

Corcoran v. Ardra Ins. Co., Ltd., 842 F.2d 31, 37 (2d Cir. 1988) emphasis added).[7] *See also Law Enforcement Ins. Co., Ltd. v. Corcoran*, 807 F.2d 38, 42-44 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1896 (1987).

The interpretation of § 711(c) and the effect of the commissioner's interpretation of the reinsurance contract, however, are not the only important matters of state law relevant to the

---

[6] The receivership court indicated as much when it authorized the declaratory judgment proceeding by noting that "the performance by Crown under said Agreement will materially effect (sic) the ability of the Receiver to pay claims to insureds of United Equity."

[7] The New York statutory liquidation procedures are similar to those adopted in Oklahoma. Of course, to the extent that Crown might attempt to distinguish *Corcoran* by arguing that policyhoders could directly sue reinsurers in Oklahoma, the question is itself a matter of state law which is integrally related to the state scheme adopted for the liquidation of delinquent insurers, and, as such, should not be decided by a federal court in these circumstances.

liquidation of insolvent insurers. At trial, Crown argued that the declaratory judgment action nonetheless required application of Okla. Stat. tit. 36 § 1928 which defines a reinsurer's right of offset in a liquidation proceeding. Although the federal district court did not find the statute applicable since the declaratory judgment action was technically not a liquidation proceeding, it did analogize to it in determining that Crown was entitled to the offset right which it requested. On appeal, Grimes challenges the district court's determination of Crown's offset right based on its interpretation of the statute. Again, whether or not the statute is applicable and what its provisions require are matters which are inseparably related to a state liquidation proceeding, and, as such, should not be decided in a federal court especially when a state has attempted to create courts of special competence to decide such issues.

Allowing the district court to exercise jurisdiction in this case would disrupt the ability of the state officers of Oklahoma in conjunction with the Oklahoma County District Court to devise and efficiently operate a complex system of administrative and judicial interrelationships which makes up the statutory scheme for liquidating insolvent insurers in Oklahoma. Accordingly we hold that the district court should have abstained in this case.

Crown asserts that even if abstention would have been appropriate in the first instance, Grimes has waived his right to assert this argument on appeal, because he did not raise it in the district court.[5] However, where abstention is at issue, the failure to raise it at the district court level does not necessarily waive the appellant's right to raise it on appeal. *See Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir. 1983) ("[T]he court has the power and in an appropriate case the duty to order abstention, if necessary for the first time at the appellate level, even though no party is asking for it."); *Naylor v. Case &*

[5] Although this is true, we note the relevance of many of the jurisdictional arguments raised below to the abstention issue. Further, both sides have vigorously argued the abstention issue on appeal.

McGrath Inc., 585 F.2d 557, 563 (2d Cir. 1978) (Abstention may be raised by the court *sua sponte*."); *AFA Distributing Co. v. Pearl Brewing Co.*, 470 F.2d 1210, 1213 (4th Cir. 1973) ("Although the failure of the parties to raise the abstention issue either at trial or on appeal is entitled to some consideration, the public policy underlying the application of the abstention doctrine is so strong that we notice its application *ex mero motu*."); *Urbano v. Board of Managers of New Jersey State Prison*, 415 F.2d 247, 254 n.20 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970); ("We do not believe that appellee's failure to assert the abstention principle below bars our resort to the abstention doctrine on appeal under the circumstances here."); *see also* 17A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4245 at 101 (1988).

We have previously declined, at least in part, to direct abstention based on *Colorado River* grounds when the abstention issue was not raised in the trial court. *See New Mexico v. Molybdenum Corp. of Am.*, 570 F.2d 1364, 1367 (10th Cir. 1978).[9] But, while *Burford* abstention is concerned with preventing the disruption "of state efforts to establish a coherent policy with respect to a matter of substantial public concern," *Colorado River* abstention is based on the policy of conserving judicial resources in situations involving the contemporaneous exercise of concurrent jurisdictions. Thus, under *Colorado River*, once a federal court has tried the case on its merits, it would be rare that judicial resources would be conserved by abstaining on appeal. The policy underlying *Burford*, however, is not affected by a determination on the merits of a federal district court.[10]

Accordingly, where *Burford* abstention is appropriate, it can be ordered on appeal. Therefore, the decision of the district court

---

[9] In *Molybdenum Corp.*, we also found that any sort of abstention was unjustified.

[10] The *Colorado River* Court itself indicated that the application of that doctrine was considerably narrower than were the other kinds of abstention. *Colorado River*, 424 U.S. at 818.

in this case is REVERSED and REMANDED with direction to the district court to REMAND[11] this case to the District Court of Oklahoma County.

[11] " '[A]bstention can be exercised through remand, assuring an adjudication of the state law issues in the pending action without risk of delay. That is the indicated course where, as here, the state law is uncertain and its resolution a matter of concern to the state.' " *Corcoran*, 842 F.2d at 36 (quoting *Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 565 (2d Cir. 1978)).

APPENDIX B

OCTOBER 14, 1988

Before Honorable William J. Holloway, Jr., Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby, Honorable David M. Ebel, Circuit Judges

GERALD GRIMES, Insurance Commissioner of the State of Oklahoma, Receiver for the United Equity Life Insurance Company; and OKLAHOMA LIFE AND HEALTH GUARANTY ASSOCIATION,	)	
Plaintiffs-Appellants,	)	
vs.	)	
CROWN LIFE INSURANCE COMPANY,	)	No. 86-1905
Defendant-Appellee,	)	
REINSURANCE ASSOCIATION OF AMERICA and AMERICAN COUNSEL OF LIFE INSURANCE (ACLI),	)	
Amici Curiae.	)	

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member

of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher

Patrick Fisher
Chief Deputy Clerk

No. 88-1155

Supreme Court, U.S.
FILED
MAR 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CROWN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

GERALD GRIMES, Insurance Commissioner of the State of Oklahoma, Receiver for the United Equity Life Insurance Company; and OKLAHOMA LIFE AND HEALTH GUARANTY ASSOCIATION,

Respondents.

RESPONSE TO PETITION FOR CERTIORARI

KERR, IRVINE & RHODES

DON J. GUTTERIDGE, JR.
Counsel of Record
JAMES W. RHODES
HORACE G. RHODES
Attorneys for The Oklahoma Life and Health Insurance Guaranty Association
600 Bank of Oklahoma Plaza
Oklahoma City, Oklahoma 73102
(405) 272-9221

BERT E. MARSHALL
General Counsel,
Oklahoma Insurance Department
P.O. Box 53408
Oklahoma City, Oklahoma 73152-3408
Attorney for Respondent
Gerald Grimes

February 28, 1989

TABLE OF CONTENTS

Page

A. CASES

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT AND AUTHORITY 3

POINT 1: FAILURE TO RAISE ABSTENTION IN THE FEDERAL DISTRICT COURT DOES NOT WAIVE AN APPELLANT'S RIGHT TO ARGUE THE DOCTRINE ON APPEAL 3

POINT 2: IN THIS CASE ABSTENTION WAS WARRANTED TO PREVENT INTERFERENCE BY THE FEDERAL COURT IN OKLAHOMA'S STATUTORY INSURANCE INSOLVENCY PROCEDURE 4

POINT 3: THE FACT THAT RESPONDENTS DID NOT RAISE THE ISSUE OF ABSTENTION IN THIS ACTION UNTIL THE APPELLATE LEVEL IS IMMATERIAL 7

CONCLUSION 11

TABLE OF AUTHORITIES

	Page
A.F.A. Distributing Co. Inc. v. Pearl Brewing Co., 470 F.2d 1210 (4th Cir. 1973)	4
Aims Enterprises, Inc. v. Muir, 609 F.Supp. 257 (E.C. Pa. 1985)	6, 8n
Baird v. Bellotti, 393 F.Supp. 847 (D. Mass. 1975)	3n
Bellotti v. Baird, 428 U.S. 132 (1976)	3
Blackhawk Heating and Plumbing Co. v. Geeslin, 530 F.2d 154 (7th Cir. 1976)	5n
Brown v. Link Belt Division of FMC Corp., 666 F.2d 110 (5th Cir. 1982)	6
Burford v. Sun Oil Co., 319 U.S. 315 (1943)	*passim*
Central States, Southeast-Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Company, 600 F.2d 677 (7th Cir. 1979)	6, 7
City of Houston v. Hill, 482 U.S. 451 (1987)	3, 4
Colorado River Water Conservation District v. United States, 424 U.S. 800, 814 (1976)	8, 10n
Constantineau v. Grager, 302 F.Supp. 861 (E.D. Wisc. 1969)	3n
Corcoran v. Ardra Insurance Co. Ltd., 842 F.2d 31 (2nd Cir. 1988)	5
Corcoran v. Ardra Insurance Co. Ltd., 637 F.Supp. 1223 (S.D.N.Y. 1987)	5n

Page

Cummings Wholesale Electric Company Inc. v. Home Owners Insurance Co., 492 F.2d 268 (7th Cir. 1974), *cert. den.* 419 U.S. 833 6

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 4n

Grimes v. Crown Life Ins. Co., 857 F.2d 699 7

In re Texas Turn-Key Operators, Inc., 70 BR 193 (Banker S.D. Tx, 1986) 7

Independent Petrochemical Corp. v. Aetna Casualty and Surety Co., 672 F.Supp. 1 (D.D.C. 1986), *aff'd* 784 F.2d 1131 6

Lac D'Amiante Du Quebec, Ltee. v. American Home Assurance Co., 864 F.2d 1033 (3rd Cir. 1988) 5

Law Enforcement Insurance Co., Ltd. v. Corcoran, 807 F.2d 38 (2nd Cir. 1986), *cert. den.* 481 U.S. 1017 5

Law Enforcement Insurance Co., Ltd. v. Corcoran, 666 F.Supp. 271 (S.D.N.Y. 1986) ... 6n

Levy v. Lewis, 635 F.2d 960 (2nd Cir. 1980) 6

Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) 4n

Mathias v. Lennon, 474 F.Supp. 949 (S.D.N.Y. 1979) 6, 8n

Matter of All-Star Insurance Corporation, 484 F.Supp. 623 (E.D. Wisc. 1980) 6

Mazanec v. North Judson-San Pierre School Corporation, 763 F.2d 845, (7th Cir. 1985) 9, 10

Metropolitan Life Insurance Co. v. Board of Directors 572 F.Supp. 460 (W.D. Wisc. 1983) . 6, 8n

	Page
Middlesex County Ethics Commission v. Garden State Bar Association, 457 U.S. 423 (1982)	8
Motlow v. Southern Holding and Securities Corp., 95 F.2d 721 (8th Cir. 1938), Cert. den. 305 U.S. 609	5n
New Mexico v. Molydenum Corporation of America, 570 F.2d 1364 (10th Cir. 1978)	10
Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)	8, 9, 10
Old Security Life Insurance Company v. Continental Illinois National Bank and Trust Co. of Chicago, 740 F.2d 1384 (7th Cir. 1984)	6
Pennsylvania General Casualty Co. v. Pennsylvania, 294 U.S. 189 (1935)	5n
Pennzoil v. Texaco, 481 U.S. 1 (1987)	9
Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941)	3, 9
Serpas v. Schmidt, 827 F.2d 23, (7th Cir. 1987)	9, 10
Stoller v. Baldwin United Corp., (S.D. Ohio, Sept. 19, 1984) **Fed. Sec. L. Rep.**, (CCH) 1984 Transfer Binder, Paragraph 91,678, pg. 99,422	7
United States v. Bank of New York and Trust Co., 296 U.S. 463 (1936)	5n
Urbano v. Board of Managers of New Jersey State Prison, 415 F.2d 247 (3rd Cir. 1969), *cert. den.* 397 U.S. 948	4

Page

Waldron v. McAtee, 723 F.2d 1348 (7th Cir. 1983) 4

Wisconsin v. Constantineau, 400 U.S. 433 (1971) . 3, 4n

Younger v. Harris, 401 U.S. 37 (1971) 8, 9

B. STATUTES

36 O.S. §1901 et seq. (The Uniform Insurer Liquidation Act) 1, 4, 7

36 O.S. §1901 4

15 U.S.C. §1011 et seq. (The McCarran-Ferguson Act) 5, 5n, 7

15 U.S.C. §1011 ..... 5n

15 U.S.C. §1012 ..... 5n

C. OTHER AUTHORITIES

Federal Practice and Procedure; Miller and Cooper; 17A §4245 ..... 4n

Federal Practice And Procedure; Miller and Cooper, 17A §4251 ..... 8n

No. 88-1155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CROWN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

GERALD GRIMES, Insurance Commissioner of the State of Oklahoma, Receiver for the United Equity Life Insurance Company; and OKLAHOMA LIFE AND HEALTH GUARANTY ASSOCIATION,

Respondents.

RESPONSE TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

This action originated out of insurance insolvency proceedings instituted against United Equity Life Insurance Company ("United Equity") by Oklahoma Insurance Commissioner Gerald Grimes ("Commissioner") in the Oklahoma District Court of Oklahoma County pursuant to the Uniform Insurer Liquidation Act (36 O.S. §1901 et seq., hereinafter "Liquidation Act"). On May 24, 1984, the Commissioner filed a petition in the said Court as United Equity's receiver seeking Declaratory Judgment against Crown Life Insurance Company ("Crown") based upon a reinsurance

agreement Crown had entered into with United Equity in 1983. The Commissioner was joined by the Oklahoma Life and Health Insurance Guaranty Association ("Guaranty Association"), a statutory entity charged with the payment of claims by United Equity's policyholders.

On June 22, 1984 Crown had the action removed to the Federal District Court for the Western District of Oklahoma based on diversity of citizenship. The Commissioner and the Guaranty Association vigorously objected to such removal, arguing that the state court had exclusive jurisdiction under the Liquidation Act and that federal courts had traditionally refused to take jurisdiction over matters involving insurance receiverships. On August 30, 1984 the Court denied Plaintiffs' Motion to Dismiss and accepted jurisdiction. The Plaintiffs renewed their Motion repeatedly throughout the subsequent proceedings but the Court continued to deny it.

The Court at the Pretrial Conference bifurcated the proceedings. The initial stage consisted of a trial to the Court regarding the interpretation of the terms of the Reinsurance Agreement. The factual issues of misrepresentation which had been raised by Crown were temporarily set aside for later trial. This second stage was never reached because the Court's ruling on the interpretation of the contract was dispositive. On May 19, 1986, in a one day proceeding, the Court heard evidence on the interpretation of the rights, duties and obligations of the respective parties to the Reinsurance Agreement and found in favor of Crown. This was reflected in an Order of the Court, dated June 9, 1986.

The Plaintiffs appealed the trial court's order to the Court of Appeals for the Tenth Circuit. In an order entered on September 16, 1988 the Court of Appeals reversed the District Court, holding the court should have abstained and left this matter to the state court (The Circuit Court's opinion was attached to Crown's Petition to this Court at Appendix A and is reported at 857 F.2d 699). Crown immediately filed a petition for rehearing which was denied by the Circuit Court on October 14, 1988. On January 10, 1989 Crown filed a Petition for a Writ of Certiorari with this Court.

SUMMARY OF ARGUMENT

Abstention is not waived by a failure to assert it at trial. The doctrine can be raised on appeal by a party or by the court on its own motion. In this case Respondents' failure to raise abstention in the district court is immaterial. The law and evidence clearly mandated abstention under the branch of the doctrine first described by this Court in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). There is no reason to grant certiorari in this matter.

ARGUMENT AND AUTHORITY

POINT 1: FAILURE TO RAISE ABSTENTION IN THE FEDERAL DISTRICT COURT DOES NOT WAIVE AN APPELLANT'S RIGHT TO ARGUE THE DOCTRINE ON APPEAL.

In the case of *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), this Court considered and rejected the applicability of abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) to a constitutional challenge of a Wisconsin statute despite the fact that abstention had not been raised in the lower court[1] and was not raised by the state on appeal. The Court followed the *Constantineau* precedent in *Bellotti v. Baird*, 428 U.S. 132 (1976), wherein it stated: "The fact that the full arguments in favor of abstention may not have been asserted in the District Court does not bar this Court's consideration of the issue" (at note 10). The Court in *Bellotti* considered and applied *Pullman* abstention even though it had not been properly asserted below.[2]

More recently, in the case of *City of Houston v. Hill*, 482 U.S. 451 (1987), this Court again relied on *Constantineau* in applying *Pullman* abstention to an action challenging the constitutionality of a city ordinance despite the fact that the Defendant had "given its acquiescence for more than three years to

---

[1] See *Constantineau v. Grager*, 302 F.Supp. 861 (E.D. Wisc. 1969)

[2] See *Baird v. Bellotti*, 393 F.Supp. 847 (D. Mass. 1975).

federal adjudication of the merits. . ."[3] While the Court termed the failure to assert the argument below "remarkable", it concluded, "These circumstances undercut the force of the City's argument, but do not bar us from considering it." (at note 16).

The Circuit Courts have also held that abstention may be raised for the first time on appeal, *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983), *A.F.A. Distributing Co. Inc. v. Pearl Brewing Co.*, 470 F.2d 1210 (4th Cir. 1973), *Urbano v. Board of Managers of New Jersey State Prison*, 415 F.2d 247 (3rd Cir. 1969), *Cert. den.* 397 U.S. 948. The failure to raise abstention at the district court level clearly does not constitute a waiver of a party's right to assert it on appeal[4].

POINT 2: IN THIS CASE ABSTENTION WAS WARRANTED TO PREVENT INTERFERENCE BY THE FEDERAL COURT IN OKLAHOMA'S STATUTORY INSURANCE INSOLVENCY PROCEDURE.

The Uniform Insurer Liquidation Act provides Oklahoma with a coherent and comprehensive procedure for liquidating insolvent insurance companies. The Act provides a forum for the adjudication of all disputes involving the liquidation in the Oklahoma District Court of Oklahoma County. (36 O.S. §1901). Such a well-organized regulatory scheme coupled with a thorough judicial review in the state courts as well as Oklahoma's strong interest in protecting policyholders, combined to mandate abstention by the district court under this Court's holding in *Burford v. Sun Oil Co.*, supra. This mandate was reinforced by the express federal policy of non interference with insurance

---

[3] In the instant action there has been no such acquiescence. See Point 3, infra.

[4] There is in fact no requirement that the issue even be raised by a party at all as the court may do so **sua sponte**. *Wisconsin v. Constantineau*, supra. See for example: *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) and *Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) wherein the district courts abstained on their own motions. See generally Wright, Miller, and Cooper, *Federal Practice and Procedure* 17A §4245.

matters embodied in the McCarran-Ferguson Act (15 U.S.C. §1011 et seq.)[5] and the traditional policy of non interference by the federal courts with matters affecting insurance receiverships.[6]

Federal Courts have almost universally found *Burford* to mandate abstention in cases involving matters which pertain to insurance insolvency proceedings. Decisions holding that abstention is proper include: *Lac D'Amiante Du Quebec, Ltee. v. American Home Assurance Co.*, 864 F.2d 1033 (3rd Cir. 1988) (The court reversed as an abuse of discretion the district court's decision not to abstain in an action to recover against an insolvent insurer); *Corcoran v. Ardra Insurance Co. Ltd.*, 842 F.2d 31 (2nd Cir. 1988) (The court sustained the district court's decision to abstain in an action by the New York Superintendent of Insurance, as receiver for an insolvent insurer, to recover reinsurance proceeds from a foreign reinsurer)[7]; *Law Enforcement Insurance Co., Ltd. v. Corcoran*, 807 F.2d 38 (2nd Cir. 1986), *cert. den.* 481 U.S. 1017 (The court sustained, based on *Burford*, the district court's decision to abstain, based on another branch of the abstention doctrine, from an action on reinsurance

---

[5] The Act reads in part as follows:

> § 1011. Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest. . .
>
> § 1012. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business. (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by a State for the purpose of regulating the business of insurance. . .

[6] See e.g.: *Pennsylvania General Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935); *United States v. Bank of New York and Trust Co.*, 296 U.S. 463 (1936); *Motlow v. Southern Holding and Securities Corp.*, 95 F.2d 721 (8th Cir. 1938), Cert. den. 305 U.S. 609; *Blackhawk Heating and Plumbing Co. v. Geeslin*, 530 F.2d 154 (7th Cir. 1976);

[7] The district court's decision is reported at *Corcoran v. Ardra Insurance Co. Ltd.*, 657 F.Supp. 1223 (S.D.N.Y. 1987).

policies issued by insolvent insurer)[5]; *Brown v. Link Belt Division of FMC Corp.*, 666 F.2d 110 (5th Cir. 1982) (The court upheld the district court's decision to abstain in an indemnity claim against an insolvent insurer); *Levy v. Lewis*, 635 F.2d 960 (2nd Cir. 1980) (The court sustained the district court's dismissal for failure to state a claim in an action under ERISA against insolvent insurer. Instead of deciding on the merits, the circuit court held abstention was proper.); *Cummings Wholesale Electric Company Inc. v. Home Owners Insurance Co.*, 492 F.2d 268 (7th Cir. 1974), *cert. den.* 419 U.S. 833 (The court upheld a dismissal of an action by holders of a surety bond issued by an insolvent insurer); *Independent Petrochemical Corp. v. Aetna Casualty and Surety Co.*, 672 F.Supp. 1 (D.D.C. 1986), *aff'd* 784 F.2d 1131 (The court abstained from an action involving an indemnity claim against an insolvent insurer); *Aims Enterprises, Inc. v. Muir*, 609 F.Supp. 257 (E.C. Pa. 1985) (The court abstained in an action by the Delaware Insurance Commissioner as receiver for an insolvent insurer to recover assets held by the Pennsylvania Insurance Commissioner); *Metropolitan Life Insurance Co. v. Board of Directors* 572 F.Supp. 460 (W.D. Wisc. 1983) (The court abstained in a declaratory judgment action against a guaranty association by an assessed member insurer in connection with the insolvency of another insurer); *Matter of All-Star Insurance Corporation*, 484 F.Supp. 623 (E.D. Wisc. 1980) (The court remanded to state court an action to collect a debt by the receiver of an insolvent insurance company which had been removed by the Defendants); *Mathias v. Lennon*, 474 F.Supp. 949 (S.D.N.Y. 1979) (The Court abstained in an action by the Illinois Director of Insurance against the rehabilitator of an insolvent New York insurer).

The only cases in which federal courts have addressed the issue and refused to abstain have been those dealing with exclusive federal remedies. Courts refusing to apply abstention include: *Old Security Life Insurance Company v. Continental Illinois National Bank and Trust Co. of Chicago*, 740 F.2d 1384 (7th Cir. 1984) (Involving claims under ERISA). *Central States,*

---

[5] The district court's decision is reported at *Law Enforcement Insurance Co., Ltd. v. Corcoran*, 666 F.Supp. 271 (S.D.N.Y., 1986).

Southeast-Southwest Areas Health and Welfare Fund v. Old Security Life Insurance Company, 600 F.2d 677 (7th Cir. 1979) (same). *Stoller v. Baldwin United Corp.*, (S.D. Ohio, Sept. 19, 1984) **Fed. Sec. L. Rep.**, (CCH) 1984 Transfer Binder, Paragraph 91,678, pg. 99,422 (Involving claims under 1934 Securities and Exchange Act); *In re Texas Turn-Key Operators, Inc.*, 70 BR 193 (Banker S.D. Tx, 1986) (Interpleader action involving a debtor in bankruptcy.) Because the instant case involves no federal remedies, these cases have no applicability.

The Uniform Insurer Liquidation Act provides a complex administrative and judicial system for liquidating an insolvent insurer. There is an express federal policy of non interference reflected in the McCarran-Ferguson Act. Therefore, abstention under *Burford v. Sun Oil Co.*, was clearly appropriate in this action. There is no argument to the contrary and indeed Crown has advanced none.

The Court of Appeals stated the matter succinctly in its opinion as follows:

> Allowing the district court to exercise jurisdiction in this case would disrupt the ability of the state officers of Oklahoma in conjunction with the Oklahoma County District Court to devise and efficiently operate a complex system of administrative and judicial interrelationships which makes up the statutory scheme for liquidating insolvent insurers in Oklahoma. (857 F.2d at 706)

POINT 3: THE FACT THAT RESPONDENTS DID NOT RAISE THE ISSUE OF ABSTENTION IN THIS ACTION UNTIL THE APPELLATE LEVEL IS IMMATERIAL.

As discussed above (see Point 1) failure to raise abstention at the district court level does not necessarily bar its consideration on appeal. The Petitioner asserts however that Respondents' failure to raise the issue at trial amounted to a waiver. This is simply not the case.

In *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977) this Court held that a state may waive abstention under the line of cases following *Younger v. Harris*, 401 U.S. 37 (1971) by voluntarily choosing to submit itself to a federal forum. Respondents in this action made no such choice. They vigorously resisted the removal of the action from the state court and hotly disputed the issue of the federal court's jurisdiction below.[9]

Moreover, this case involves abstention under *Burford*, not under *Younger*. *Younger* abstention is applicable where "vital state interests" are concerned and there is an ongoing state proceeding with the opportunity to present constitutional challenges. *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423 (1982)[10]. *Burford* abstention on the other hand is only appropriate when: "[T]he exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976).

Burford abstention is thus more limited in its application. Abstention under *Younger* is grounded on general concerns of federalism.[11] *Burford* abstention is based on the very specific need

---

[9] The Court of Appeals case noted in its opinion "the relevance of many of the jurisdictional arguments raised below to the abstention issue" (at Note 8). Indeed the issues involved are extremely similar as both arguments turn on fact that the federal court was interfering with Oklahoma's liquidation scheme by assuming jurisdiction over this action.

[10] Some federal district courts have applied *Younger* as well as *Burford* abstention to actions involving insolvent insurers. See e.g. *Aims Enterprises Inc. v. Muir*, supra; *Metropolitan Life Insurance Co. v. Board of Directors*, supra; *Matthias v. Lennon*, supra. No circuit court appears to have followed suit.

[11] In fact, Justice Black in his opinion in *Younger* referred to the doctrine as "Our Federalism", a term which has continued to be applied by some courts and commentators. See generally Wright, Miller and Cooper, *Federal Practice and Procedure*, 17A §4251.

to prevent federal intrusion into complex state regulatory schemes when the mere exercise of jurisdiction by the federal courts would be disruptive. Waiver would obviously seem less appropriate in such situations. As far as can be determined, no court has ever held that abstention under *Burford* can be waived. In this case the Court of Appeals applied abstention under *Burford*, not *Younger* and the concept of voluntary waiver which this Court established in *Hodory* is not relevant here.

In its Petition for Certiorari, Crown relies primarily on two cases from the Court of Appeals for the Seventh Circuit; *Serpas v. Schmidt*, 827 F.2d 23, (7th Cir. 1987) and *Mazanec v. North Judson-San Pierre School Corporation*, 763 F.2d 845, (7th Cir. 1985). These cases relate to the presumption against abstention in that circuit once a case has gone to trial. They do not apply in this case for several reasons.

In the first place, both of the Seventh Circuit cases involved a willing submission to the federal forum by the defendant state entities.[12] In both cases the states answered complaints filed in federal court without objecting to the court's jurisdiction or seeking abstention until after the trial had been held.[13] This voluntary conduct brings these cases into line with this Court's holding in *Ohio Bureau of Employment Services v. Hodory*, supra, and distinguishes them from the case at bar in which the Respondents strongly resisted the removal of the action to federal court.

In the second place, both of the cases involved *Pullman* abstention. In the case of *Pennzoil v. Texaco*, 481 U.S. 1 at note 9 (1987) this Court noted that *Pullman* and *Younger* abstention involve

---

[12] In *Mazanec* the Court noted: "[T]hese state officials were willing (to litigate the case in federal court), until the case was two years old and had been tried . . ." (763 F.2d at 849). In *Serpas* the Court observed: "[T]he defendants are state officials who raised no objection to having the claims against them litigated in Federal Court until this court itself raised the abstention issue." (827 F.2d at 27, nt. 2)

[13] In *Mazanec* abstention was initially asserted but dropped when Plaintiffs filed an amended complaint. (763 F.2d at 847).

similar considerations. Again this brings the Seventh Circuit cases into line with *Hodory* but distinguishes them from the instant case where the court applied abstention under *Burford*. Under *Burford*, a court must consider more than the delay and interests of judicial economy urged by the Petitioner. In this case the mere fact that the federal court accepted jurisdiction constituted interference with the orderly conduct of United Equity's liquidation. While abstention after the district court's one day trial in this action may constitute a waste of judicial resource, this is a small price to pay for preventing federal intrusion into the orderly administration of Oklahoma's liquidation procedure.

Furthermore, *Serpas* and *Mazanec* deal with only a presumption that abstention is not warranted once an action has gone to trial. The presumption is rebuttable. *Mazanec v. North Judson-San Pierre School Corp.*, supra at 847, *Serpas v. Schmidt*, supra at nt. 2. In this case it cannot be disputed that abstention under *Burford* was appropriate (See Point 2). Any presumption against abstaining would be overwhelmingly rebutted by the vast amount of law and evidence supporting it.

Nor is there any conflict, as Petitioner suggests, between the Tenth and Seventh Circuits in this area. The Court of Appeals in this action noted that it had also held abstention was inappropriate when not raised at trial in the case of *New Mexico v. Molydenum Corporation of America*, 570 F.2d 1364 (10th Cir. 1978).[14] It explained however that: "[B]urford abstention is concerned with preventing the disruption of state efforts to establish a coherent policy with respect to a matter of substantial public policy. . . . The policy underlying *Burford* . . . is not affected by a determination on the merits by a federal district court." (857 F.2d at 707). There is no conflict between this holding and the Seventh Circuit cases cited by petitioner. Further, even if a conflict did exist, this case, where abstention is so clearly mandated, would not be a proper vehicle for resolving it.

---

[14] Declining to apply abstention under *Colorado River*.

CONCLUSION

For the foregoing reasons, this Court should deny the petition filed herein and refuse to issue a writ of certiorari in this matter.

Respectfully submitted,

KERR, IRVINE & RHODES
DON J. GUTTERIDGE, JR.
Counsel of Record
JAMES W. RHODES
HORACE G. RHODES

600 Bank of Oklahoma Plaza
Oklahoma City, Oklahoma 73102
(405) 272-9221

Attorneys for Oklahoma Life and Health Insurance Guaranty Association

BERT E. MARSHALL
General Counsel, Oklahoma Insurance Department
P.O. Box 53408
Oklahoma City, Oklahoma 73152-3408

Attorney for Respondent Gerald Grimes

No. 88-1155

Supreme Court, U.S.
FILED
MAR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CROWN LIFE INSURANCE COMPANY,

Petitioner,

—v.—

GERALD GRIMES, Insurance Commissioner of the State of Oklahoma, Receiver for the United Equity Life Insurance Company; and OKLAHOMA LIFE AND HEALTH GUARANTY ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

FREDERICK B. LACEY
Counsel of Record
JOHN S. KINZEY
CECELIA KEMPLER
ELIZABETH PAGE FOUCHER
LEBOEUF, LAMB, LEIBY & MACRAE
520 Madison Avenue
New York, New York 10022
(212) 715-8000

Of Counsel:

BURCK BAILEY
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS
2400 First National Center West
Oklahoma City, Oklahoma 73102
(405) 232-0621

—and—

C. WAYNE LITCHFIELD
LITCHFIELD & PATTERSON
Suite 106
5101 North Classen Boulevard
P. O. Box 18472
Oklahoma City, Oklahoma 73118-0472
(405) 843-4400

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Petitioner's Reply Brief	1

TABLE OF AUTHORITIES

	Page
Burford v. Sun Oil Co., 319 U.S. 315 (1943)	2n
Corcoran v. Ardra Insurance Co. Ltd., 842 F.2d 31 (2d Cir. 1988)	4n
Mazanec v. North Judson – San Pierre School Corp., 763 F.2d 845 (7th Cir. 1985)	3, 3n
Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)	2
Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941)	1n
Serpas v. Schmidt, 827 F.2d 23 (7th Cir. 1987)	3, 3n
Younger v. Harris, 401 U.S. 37 (1971)	2n

No. 88-1155

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CROWN LIFE INSURANCE COMPANY,
Petitioner,

—v.—

GERALD GRIMES, Insurance Commissioner of the State of Oklahoma, Receiver for the United Equity Life Insurance Company; and OKLAHOMA LIFE AND HEALTH GUARANTY ASSOCIATION,
Respondents.

ON PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

1. In response to Petitioner's principal argument that a state agency should be presumed to have waived its right to seek abstention if it allows a case to proceed to trial on the merits and judgment in the district court, Respondents first argue that as a matter of law a state agency never waives abstention by failing to seek abstention prior to appeal. However, Respondents' argument relies primarily on cases applying the *Pullman* branch of the abstention doctrine.[1] As Crown Life recognized in its

[1] *Railroad Commission v. Pullman Company*, 312 U.S. 496 (1941). Respondents also cite the four circuit court cases on which the Tenth Circuit
(Footnote continued)

Petition, this Court has held that the litigants may not waive the application of the *Pullman* doctrine because that doctrine implicates the federal court's own institutional interest in avoiding constitutional adjudications that may be made unnecessary by a state court's construction of an ambiguous statute. *See* Petition at 6, n.5. The Court has expressly held that a state agency may waive the protection of *Younger* abstention,[2] because that doctrine is intended to benefit the state by avoiding unnecessary federal interference in its judicial proceedings. *Ohio Bureau of Employment v. Hodory*, 431 U.S. 471, 480 (1977). *See* Petition at 6. The same reasoning must apply to *Burford* abstention,[3] because it, like *Younger*, is founded on considerations of comity rather than reluctance to adjudicate constitutional issues.

2. Respondents next argue that, on the merits, this is a case in which abstention is appropriate. However, the merits of Respondents' abstention arguments are irrelevant to the issue of whether Respondents should be presumed to have waived abstention by failing to seek the appropriate relief prior to trial and the entry of judgment. No matter how strong the arguments for abstention may be, this Court has held that a state agency may waive the protection of the abstention doctrine, *Ohio Bureau of Employment v. Hodory*, 431 U.S. 471, 480 (1977), and an agency should not be allowed to defer its decision to seek abstention until after a district court has invested the resources necessary to try and decide a case. Regardless of whether a district judge invests one day or a hundred days in trying a case, the approach followed by the Tenth Circuit here will encourage the waste of judicial resources by allowing a state agency to hold its abstention arguments in reserve until the agency learns whether it will prevail on the merits in the federal court. A rule

---

relied in the opinion below. These cases were distinguished in the Petition at 8, n.8, as cases in which the district court had resolved the litigation in its early stages, without conducting a trial.

[2] *Younger v. Harris*, 401 U.S. 37 (1971).

[3] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1983).

that places no penalty on a state agency that fails to raise its abstention arguments prior to trial, the entry of judgment, and appeal will in fact frustrate the proper functioning of the abstention doctrine. Abstention should be applied in a way that encourages litigants to identify potential conflicts between federal and state interests early in the federal litigation, before substantial federal judicial resources have been invested in the case, and before there has been any interference with the functioning of the state's regulatory or judicial system by virtue of the pendency of the federal litigation.[4]

3. Finally, Respondents argue that because the Tenth Circuit was applying *Burford* abstention rather than *Younger* abstention, there is no conflict between the Tenth Circuit's decision herein that allowed abstention to be raised initially on appeal and the Seventh Circuit's decisions in *Serpas v. Schmidt*, 827 F.2d 23 (7th Cir. 1987) and *Mazanec v. North Judson - San Pierre School Corp.*, 763 F.2d 845 (7th Cir. 1985) that held that a state agency is presumed to have waived abstention if it fails to seek abstention prior to trial.[5] However, as the Petition demonstrates,

---

[4] The inefficiencies and unfairness that can result from a state agency's delay in invoking the abstention doctrine are illustrated by the facts of this case. While this case was pending in the federal court, the liquidation of United Equity Life Insurance Company ("UELIC") went forward in the state courts, and it is Petitioner's understanding that the liquidation is now substantially completed. Remanding this case at the present time will not result in any meaningful opportunity to coordinate this litigation with the liquidation of UELIC in the state courts, but will instead simply submit Petitioner to the unfair burden of defending itself for a second time in a state-court forum which the Respondents find more advantageous now that they have learned how the federal court has ruled on the merits of their claims against Petitioner.

[5] Respondents also attempt to distinguish *Serpas v. Schmidt* and *Mazanec v. North Judson - San Pierre School Corp.* on the basis that both of these Seventh Circuit cases considered the possible application of *Pullman* abstention. Respondents' arguments are somewhat curious, because these cases involve *Pullman* abstention only to the extent that the Seventh Circuit found that *Pullman* abstention was not applicable in either case so as to rebut a presumption that there had been a waiver of the right to seek abstention. *Serpas v. Schmidt*, 827 F.2d at 27, n.2, *Mazanec v. North Judson - San Pierre School Corp.*, 763 F.2d at 847-48. As is pointed out in the Petition at 7, n.7, the rule

(Footnote continued)

both the *Younger* and *Burford* abstention doctrines are founded on considerations of federalism and comity, and are identical in all respects relevant to the issue raised by the Petition. Petition at 4-5. Despite the suggestions to the contrary in the Response, a state's interest in the enforcement of its criminal laws, which is the interest that the *Younger* doctrine was originally designed to protect, is every bit as compelling as the state's interest in developing coherent and uniform administrative policies, which is the context in which *Burford* evolved. Both these doctrines have been created by the federal judiciary for the protection of the state and its agencies. In return for the benefits of these doctrines, it is by no means unreasonable for a state agency to be required to invoke abstention in a timely fashion, before the federal district court has taken the time and effort necessary to try and decide a case, or suffer a presumption that the agency has chosen to waive its right to seek abstention.[6]

---

in the Seventh Circuit, consistent with this Court's holdings that *Pullman* abstention cannot be waived by the litigants, is that the Seventh Circuit's presumption that abstention is waived if not raised prior to the trial and appeal is rebuttable by a showing that *Pullman* abstention is appropriate.

[6] Respondents also argue that their challenge to the district court's subject matter jurisdiction should be treated as equivalent to a request for abstention in the trial court. However, the question of whether the district court has subject matter jurisdiction of a case is separate and distinct, and turns on completely different legal considerations, from the question of whether the court should abstain from exercising that jurisdiction once it is found to exist. If Respondents had wished to seek abstention as well as question jurisdiction, they could have easily done so in a single pretrial motion, as was done by a similarly-situated liquidator of an insurance company in a case on which Respondents rely. *See Corcoran v. Ardra Ins. Co. Ltd.*, 842 F.2d 31 (2d Cir. 1988).

Respectfully submitted,

FREDERICK B. LACEY
Counsel of Record for
Petitioner Crown Life
Insurance Company
JOHN S. KINZEY
CECELIA KEMPLER
ELIZABETH PAGE FOUCHER
LEBOEUF, LAMB, LEIBY
& MACRAE
520 MADISON AVENUE
NEW YORK, NEW YORK
10022
(212) 715-8000

Of Counsel:

BURCK BAILEY
FELLERS, SNIDER,
BLANKENSHIP,
BAILEY & TIPPENS
2400 First National
Center West
Oklahoma City, Oklahoma
73102
(405) 232-0621

-and-

C. WAYNE LITCHFIELD
LITCHFIELD & PATTERSON
Suite 106
5101 North Classen Boulevard
P.O. Box 18472
Oklahoma City, Oklahoma
73118-0472
(405) 843-4400

March 7, 1989